No. 98-347

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JAMES T. GOLDSMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONERS

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A. The All Writs Act Does Not Provide Jurisdiction For The Court Of Appeals' Order In This Case

The All Writs Act, 28 U.S.C. 1651(a), provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Contrary to respondent's contention, that Act provides no basis for the action of the Court of Appeals for the Armed Forces (CAAF) in this case. See Gov't Br. 15-16. The action to drop respondent from the rolls fell well outside the CAAF's jurisdiction, and alternative avenues of relief authorized by statute were open to respondent. Accordingly, the CAAF did not act "in aid of [its] jurisdiction" when it enjoined petitioner from dropping respondent from the rolls

and its action was neither "necessary" nor "appropriate * * * and agreeable to the usages and principles of law."

1. *Potential jurisdiction.* Respondent seeks to justify (Br. 12) the CAAF's exercise of authority under the All Writs Act in this case by pointing to its "supervisory power over the administration of military justice for cases within its potential jurisdiction." This case, however, was not within the CAAF's "potential jurisdiction," and the CAAF was not exercising its "supervisory power."

a. At most, a case remains within the CAAF's "potential jurisdiction" for so long as the findings and sentence could become the subject of direct review by the CAAF. See 10 U.S.C. 866, 867. But the approved findings and sentence in respondent's case had become final more than one year before the Air Force initiated this action to drop respondent from the rolls. The opportunity to seek discretionary review in the CAAF had, therefore, long expired. The court-martial sentence was thus not within the CAAF's potential jurisdiction when respondent presented his current claim to the CAAF.[1]

In addition, respondent's claims are not within the CAAF's jurisdiction—actual or potential—because they do not challenge the findings or sentence of the court-martial. See 10 U.S.C. 866, 867. Respondent does not allege any error in the court-martial findings or sentence. Instead, respondent claims that the government could not drop him from the rolls pursuant to 10 U.S.C. 1161(b)(2) (Supp. II 1996). As we explained in our opening brief (at 17-18), that provision sets forth an administrative separation procedure that is not—and could not be—part of the court-martial

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[1] Respondent's assertion (Br. 8) that "[m]ilitary courts lack interlocutory appeal procedures for an accused to resolve a colorable claim of double jeopardy and *ex post facto* violations" is of no significance to this case. Because this case does not involve an interlocutory appeal, it does not present the question whether the CAAF could use authority under the All Writs Act to substitute for an interlocutory appeal in an appropriate case.

sentence. See R.C.M. 1003(b)(9) ("A court-martial may not adjudge an administrative separation from the service."). Accordingly, respondent's claim that he should not be dropped from the rolls is not a claim within the CAAF's statutory jurisdiction.

b. Respondent is mistaken in claiming (Br. 11-13) that the CAAF's jurisdiction can be supported as an exercise of "supervisory authority" in this case. Initially, "supervisory authority" is not a basis for jurisdiction, but instead is a basis for a superior court to announce rules governing inferior courts, in the course of deciding cases that are within the superior court's jurisdiction. As this Court has explained, a court's "supervisory authority" permits the superior court in some circumstances to "formulate procedural rules not specifically required by the Constitution or the Congress * * * to implement a remedy for violation of recognized rights, * * * to preserve judicial integrity * * *, and * * * to deter illegal conduct." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983).

In addition, not only does "supervisory authority" fail to provide an independent source of jurisdiction, a court does not have general "supervisory authority" over non-judicial proceedings or actors. See *United States* v. *Williams*, 504 U.S. 36, 47 (1992) ("Because the grand jury is an institution separate from the courts," no general "'supervisory' judicial authority exists" to set standards of prosecutorial conduct before the grand jury). The action to drop respondent from the rolls was not a judicial proceeding. Nor did respondent claim in his challenge to that action that there had been anything amiss in the proceedings or results in his court-martial or in any court that had reviewed his court-martial. Accordingly, the CAAF had no basis for exercising any "supervisory authority" that it may have over inferior military tribunals.

2. *Protecting the adjudged findings and sentence.* Although the CAAF did not rely on this ground, respondent

claims (Br. 13) that the CAAF "could also have exercised All Writs Act jurisdiction to protect and to effectuate the adjudged and affirmed findings and sentence." Extraordinary writs may be issued to compel lower courts to adhere to an appellate court's judgment, see *United States* v. *United States District Court*, 334 U.S. 258, 263-264 (1948), but the extraordinary writ issued by the CAAF did not "protect" or "effectuate" the "affirmed findings and sentence." The "findings and sentence" in the court-martial authorized the government to impose—and the defendant to undergo—the specified punishment for his offense. That punishment was imposed, the findings and sentence were affirmed on appeal and considered final for more than a year, and, indeed, respondent had been released from custody before the CAAF's judgment in this case issued in April 1998. See Pet. App. 3a, 8a. There was therefore nothing left in the findings and sentence to "protect" or "effectuate."

It is true that the findings and sentence of the court-martial, like the judgments in many other cases, had double jeopardy consequences that could bar a successive prosecution or punishment. From the origin of double jeopardy principles in the common law pleas of *autrefois acquit* and *autrefois convict*, see *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978); *United States* v. *Scott*, 437 U.S. 82, 96 (1978), however, the means to raise that bar has always been understood to be by plea in the subsequent proceedings that are alleged to impose double jeopardy. "It was only when the defendant was indicted for a second time after either a conviction or an acquittal that he could seek the protection of the common-law pleas." *United States* v. *Wilson*, 420 U.S. 332, 342 (1975). This Court has never held that a defendant could forgo a double jeopardy claim in defense of a second action and instead seek an injunction against other proceedings from the court that issued the original criminal judgment.

Respondent's theory would turn ordinary practice upside down, as this Court's recent double jeopardy cases illustrate.

For example, in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), the convicted felon did not return to the court that had issued the criminal judgment to seek an injunction on double jeopardy and ex post facto grounds against later civil commitment proceedings; instead, following accepted practice, he pleaded the prior judgment as a bar (though an ultimately unsuccessful one) to the civil commitment proceedings. Similarly, the defendants in *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767 (1994), did not seek an injunction from the court that rendered the criminal judgment seeking to bar the State from imposing a tax based on the same offenses; instead, they raised the Double Jeopardy Clause as a bar to the State's claim in a subsequent bankruptcy proceeding. See *id.* at 773. In *United States* v. *Ursery*, 518 U.S. 267 (1996), the defendants did not attempt to vindicate their double jeopardy claims by returning to the courts in their earlier cases to seek to obtain injunctions against, respectively, the later criminal proceedings and the later civil forfeiture proceedings; instead, they challenged the new actions sought to be taken against them by pleading the earlier judgments in bar in their later proceedings. All of this Court's other recent double jeopardy cases have come to this Court through the same procedural route. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93 (1997); *Witte* v. *United States*, 515 U.S. 389 (1995); *United States* v. *Dixon*, 509 U.S. 688 (1993); *United States* v. *Felix*, 503 U.S. 378 (1992); *Dowling* v. *United States*, 493 U.S. 342 (1990); *United States* v. *Halper*, 490 U.S. 435 (1989). There is no authority for respondent's novel theory that the All Writs Act gives a court that has once issued a criminal judgment permanent jurisdiction to enjoin the government—or, as in this case, government officials who were not even parties to the criminal case—from taking future actions against the defendant that could violate the Double Jeopardy Clause.[2]

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[2] None of the cases on which respondent relies (Br. 11) would support

3. *Necessary and appropriate.* Respondent argues (Br. 15-16) that it was "necessary and appropriate" for the CAAF to exercise jurisdiction under the All Writs Act in this case, because the alternative means of making his claims were in his view "futile." In particular, he argues (Br. 15-16) that he did not have to bring his challenge to the action to drop him from the rolls before the Air Force Board for Correction of Military Records (BCMR), because, in his view, the BCMR "lack[s] the ability to declare a federal statute unconstitutional."[3]

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such a claim. In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172-175 (1977), this Court upheld the district court's authority under the All Writs Act to order a third party to assist the government in installing a pen register authorized by the court under Federal Rule of Criminal Procedure 41. The critical difference between *New York Telephone* and this case is that in *New York Telephone*, the court issued the order in the course of adjudicating an application for a pen register order that was manifestly within its jurisdiction. See 434 U.S. at 172 ("The assistance of the [New York Telephone] Company was required here to implement a pen register order which we have held the District Court was empowered to issue by Rule 41."). In *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942), the Court upheld the lower court's authority to issue a writ of habeas corpus in a federal criminal case "as an incident to the appeal [from a bail order] then pending before it;" the Court did not endorse incidental All Writs Act authority to review actions of executive officials implementing a civil statutory scheme. Nor is respondent assisted by the military cases he cites. Even assuming their correctness, each involved only the court's power to enforce prior judgments, *United States* v. *Montesinos*, 28 M.J. 38 (C.M.A. 1989); *United States* v. *Bullington*, 13 M.J. 184 (C.M.A. 1982), or review post-trial rulings, *United States* v. *Mahoney*, 36 M.J. 679, 684-685 (A.F.C.M.R. 1992), in inferior military tribunals in courts-martial cases.

[3] Respondent states (Br. 16) that "Congress has expressed considerable concern about the perception that the BCMRs are 'unresponsive, bureaucratic extensions of the uniformed services.'" In support of that statement respondent cites (Br. 16 & n.4) criticism of BCMRs in a congressional report and a subsequent statute modifying how BCMRs operate. Neither the criticism nor subsequent statute, however, alter the

Respondent's claim of futility is mistaken. The BCMR has authority generally "to correct an error or remove an injustice" in a military record. 10 U.S.C. 1552(a)(1); see also 10 U.S.C. 1553(a) (special board to review "discharge or dismissal" other than in a court-martial sentence). Although the BCMR may not have authority to "declare a federal statute unconstitutional," Resp. Br. 15-16, it would appear to have power, contrary to respondent's assertion, to correct a record that is erroneous as a result of a constitutional violation.[4] At the very least, any uncertainty on this point should be resolved against respondent, who bypassed the BCMR and therefore precluded a definitive resolution of

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fact that the BCMRs have at all relevant times been the congressionally authorized body to provide the relief sought by respondent.

[4] Although the Air Force regulations are silent on the issue, the regulations and case law regarding the Army and Navy BCMRs, which operate under the same basic statutory authorization as does the Air Force BCMR, confirm this conclusion. See 32 C.F.R. 581.3(c)(5)(v) (Army BCMR's order denying relief "shall include * * * the applicant's claims of *constitutional*, statutory and/or regulatory violations [that were] rejected") (emphasis added); 32 C.F.R. 723.3(e)(4) (same for Navy); see also *Guerra* v. *Scruggs*, 942 F.2d 270, 273 (4th Cir. 1991) ("The [Army BCMR] has authority to consider claims of constitutional, statutory, and regulatory violations."); *Bois* v. *Marsh*, 801 F.2d 462, 467 (D.C. Cir. 1986) ("Bois's claims based on Constitution, executive orders and Army regulations 'could readily have been made within the framework of this intramilitary procedure.'") (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983)); cf. *Duffy* v. *United States*, 966 F.2d 307, 311 (7th Cir. 1992) ("The mere presence of constitutional claims, however, does not obviate the need to pursue administrative remedies [before an Air Force BCMR]."). In *Brown* v. *Glines*, 444 U.S. 348, 352 n.6 (1980), this Court noted that the court of appeals had decided in that case that a party challenging an Air Force regulation regarding the circulation of petitions on First Amendment grounds did not have to bring his claim before the BCMR before filing an action in federal court. This Court did not itself reach the question whether exhaustion was required in that context.

whether the BCMR would have asserted authority to grant relief on his constitutional claims.[5]

In any event, whether or not it would have been futile for respondent to bring his claims to the BCMR, federal district court review would certainly have been available. See Gov't Br. 19-20. Respondent does not claim—and could not plausibly have claimed—that the federal courts would have been limited in their ability to adjudicate respondent's constitutional claims in the course of reviewing the administrative decision to drop him from the rolls.

4. *Ex post facto claim.* The error in the jurisdictional analyses offered by respondent and the CAAF is perhaps most apparent from a consideration of respondent's ex post facto claim. That claim is even more remote from the court-martial conviction—and therefore from the CAAF's jurisdiction—than his double jeopardy claim. If dropping respondent from the rolls would violate the Ex Post Facto Clause, it would do so regardless of the outcome of his court-martial—indeed, regardless of whether he had ever been subject to a court-martial. Because the CAAF's statutory jurisdic-

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[5] Respondent incorrectly states (Br. 16) that 10 U.S.C. 1552 "prohibits BCMR consideration of records of courts-martial and related administrative records with two inapplicable exceptions." Section 1552's bar is much narrower than that posited by respondent. The two relevant subsections are Section 1552(a)(1) and Section 1552(f). Section 1552(a)(1) provides generally that "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice" and that "such corrections shall be made by the Secretary acting through boards of civilians [BCMRs]." Section 1552(f) provides that "[w]ith respect to records of courts-martial * * *, action under subsection (a) may extend only to" cases not at issue here. Section 1552(a) and (f) thus make clear that, unless explicitely authorized, a BCMR may not correct a court-martial record. Neither subsection, however, can be read to prohibit "consideration" of a court-martial record or "related administrative records" by a BCMR, especially where, as here, the court-martial record is relevant in determining the validity of a later personnel action.

tion is limited to "review[ing] the record" in court-martial proceedings, 10 U.S.C. 867(a), the court's jurisdictional basis for reviewing respondent's ex post facto claim is particularly puzzling.

The answer to the puzzle may lie in the CAAF's frank statement that it appropriately asserted jurisdiction because "Congress intended for [the CAAF] to have broad responsibility with respect to administration of military justice." Pet. App. 5a; see also *McPhail* v. *United States*, 1 M.J. 457, 459-462 (C.M.A. 1976); Resp. Br. 9 ("Congress granted broad discretion to the CAAF to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces."). The best indication of Congress's intent, however, is found in the language and structure of the statutes governing the CAAF's jurisdiction. Those statutes provide that the CAAF has jurisdiction only to "review the record in [specified] cases reviewed by" the service Courts of Criminal Appeals, 10 U.S.C. 867(a)(2), which in turn have jurisdiction over appeals from courts-martial "in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." 10 U.S.C. 866(b)(1). The CAAF simply has no "broad responsibility with respect to the administration of military justice" outside the jurisdiction described in these statutes; other administrative bodies and courts (like the BCMR and courts reviewing BCMR decisions) have authority with respect to administrative and judicial review of other military practices. The CAAF erred in concluding that its precisely drawn jurisdictional statutes could be read as a roving commission to root out perceived injustices visited on members of the military—especially in cases like this, in which alternative (and more appropriate) remedies provided by Congress were readily available.

B. An Action To Drop An Officer From The Rolls Is Not Criminal Punishment

On the merits, we explained in our opening brief (at 24-27) that Congress intended the action to drop an officer from the rolls to be a civil, administrative proceeding that separates from the military an officer whose criminal misconduct renders him unfit to serve. We also explained (Gov't Br. 28-34) that, under *Hudson* v. *United States*, 522 U.S. at 93, an action to drop an officer from the rolls is not so punitive in purpose or effect as to negate Congress's intent that it be a remedial, not a penal, measure. Respondent offers no reason to alter those conclusions.

1. Respondent errs in claiming (Br. 20-21) that Congress has always viewed an action to drop from the rolls as a penal, rather than a remedial, measure. The action to drop from the rolls originated as Section 17 of an Army appropriations bill that was enacted on July 15, 1870. Ch. 294, 16 Stat. 319.[6] That Section provided:

> That the President of the United States be, and he is hereby, authorized to drop from the rolls of the army for desertion any officer who is now, or who may hereafter be, absent from duty three months without leave; and any officer so dropped shall forfeit all pay and allowances due or to become due, and shall not be eligible for reappointment.

16 Stat. 319. The inclusion of the provision in an appropriations bill suggests that Congress viewed the action, as we have explained, see Gov't Br. 28, as one "for the purpose

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[6] We trace in text the history of the action to drop an officer from the Army's rolls. The action to drop an officer from the naval rolls began with the Act of April 2, 1918, ch. 39, 40 Stat. 501, which was virtually identical to the 1911 statute governing the Army and discussed in text. The provision for dropping from the rolls was incorporated in the Articles for the Government of the Navy when they were included in the first edition of the United States Code, 34 U.S.C. 1200, Art. 36 (1925).

of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." W. Winthrop, *Military Law and Precedents* 746 (2d ed. 1920). The question whether this remedial step should be taken was fundamentally distinct from the question before a court-martial as to whether dismissal should be imposed as a punishment for the same absence without leave.

Shortly after its enactment, the provision for dropping from the rolls was codified at Revised Statutes § 1229 (1875 ed.) in the section of the "Organization" chapter for the Army entitled "General Provisions of Organization." Significantly, the Revisers did not include it among the penal provisions of the Articles of War, which were codified in a separate chapter under Revised Statutes § 1342 (1875 ed.).

In 1911, Congress expanded the grounds for dropping from the rolls to include not only officers absent without leave for three months, but also officers who had been imprisoned for more than three months pursuant to a conviction by a civilian court. The one-paragraph statute provided:

> That the President be, and he is hereby, authorized to drop from the rolls of the army any officer who is absent from duty three months without leave, or who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction; and no officer so dropped shall be eligible for reappointment.

Act of Jan. 19, 1911, ch. 22, 36 Stat. 894. Nothing in Congress's action in 1911 suggests that it viewed the provision as anything but a logical expansion of the remedial measure it had adopted in 1870.

The 1911 statute was included in the Articles of War for the first time when Congress revised the Articles in 1916. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650. It is instructive that the provision for dropping from the rolls—Article

118—was not included among the penal provisions of the Articles, but was instead placed under a separate subheading entitled "Miscellaneous Provisions." See § 3, 39 Stat. 669. That subheading dealt with matters such as the oath of enlistment (Art. 109), the disposition of effects of deceased soldiers (Art. 112), the removal of state civil and criminal suits against military personnel to federal district court (Art. 117), and the rank and precedence as between officers in the regular army, militia, and volunteers (Art. 119). The inclusion of Article 118 in that subheading suggests that Congress did not view it as a penal measure.[7]

In 1950, Congress enacted Public Law No. 81-506, Section 1 of which enacted the Uniform Code of Military Justice (UCMJ) to replace the Articles of War and the Articles for the Government of the Navy. See Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108 ("the articles *in this section* may be cited as 'Uniform Code of Military Justice'") (emphasis added). The action to drop from the rolls was enacted in Section 10 of the same statute, see 64 Stat. 146, and it thus never became part of the UCMJ.[8] Those responsible for

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[7] Indeed, far from treating an action to drop from the rolls as a punitive measure, Article 118 distinguished such actions from punitive dismissals. Article 118 provided:

> No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

§ 3, 39 Stat. 669.

[8] See also S. Rep. No. 486, 81st Cong., 1st Sess. 34 (1949) ("Some provisions of these remaining sections have heretofore been included in either the Articles of War or the Articles for the Government of the Navy. It is considered desirable to preserve these provisions in the statutory law;

codification initially codified the provision at 50 U.S.C. 739 (1952), which was in the chapter of Title 50 of the U.S. Code that included the UCMJ; as the codifiers noted, however, Section 739 "was not enacted as a part of the Uniform Code of Military Justice which comprises this chapter." 50 U.S.C. 739 (1952).

When Congress revised and enacted Title 10 of the U.S. Code into positive law in 1956, ch. 1041, 70A Stat. 1, the provision for dropping from the rolls was moved to its present location at 10 U.S.C. 1161(b), see 70A Stat. 89, in a chapter entitled "Separation." Once again, Congress determined not to include it in the earlier chapter entitled "Uniform Code of Military Justice," see 70A Stat. 36-78 (codifying 10 U.S.C. 801-940), thereby keeping it separate from the penal provisions in Title 10.

Respondent argues (Br. 21) that, because Congress entitled Section 1161 "Commissioned officers: limitations on dismissal," and because the term "dismissal" in his view necessarily refers to a penal sanction, Congress viewed dropping from the rolls as a penal measure.[9] The term "limitations on dismissal" in the caption of Section 1161, however, obviously refers to Section 1161(a) ("No commissioned officer may be dismissed from any armed force except" by

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however, *they are not considered to be germane to the provisions of a uniform code of justice*. By separating them from section 1, which includes all of the provisions for the Uniform Code of Justice, they will automatically be excluded from the code but preserved as statutory law in an appropriate place in the United States Code.") (emphasis added).

[9] Although a dismissal may be a penal sanction, it may also refer to the involuntary termination of an employee or member of the military. See *Webster's Third New International Dictionary of the English Language* 652 (1976) (defining "dismiss" not only as "to discharge (a military officer or cadet) without honor by reason of a sentence to dismissal by a general court-martial," but also as "to send or remove from employment, enrollment, position, or office"); *Random House Dictionary of the English Language* (2d ed. 1987) (defining "dismiss" as "to discharge or remove, as from office or service: *to dismiss an employee*").

court-martial sentence, commutation of a court-martial sentence, or presidential order in time of war), rather than Section 1161(b), where the action to drop from the rolls was codified. Unlike Section 1161(a), Section 1161(b) does not use the term "dismissal" and does not contain any limitation on dismissal. Indeed, if Congress considered dropping an officer from the rolls to be a punitive "dismissal," then Section 1161(b)'s grant of authority to drop from the rolls would be incoherent, since it would directly contradict Section 1161(a)'s limitation of such dismissals to court-martial sentences and presidential dismissals in times of war.[10]

In 1996, Section 1161(b) and Section 1167 of Title 10 were amended to permit the dropping from the rolls of an officer who has served a six-month sentence of confinement pursuant to a court-martial judgment, in addition to the previously recognized grounds of absence without leave and confinement pursuant to a conviction in a civilian court. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325. Nothing in Congress's action adding this ground for dropping from the rolls suggests that Congress intended to alter the by-then well established, remedial nature of the action to drop from the rolls.

2. Two conclusions follow from the above history.

First, because Congress viewed the action to drop from the rolls from its inception as a remedial measure, Congress consistently and deliberately kept it distinct from the provisions governing the system of military penal discipline. From the beginning, courts-martial could impose a punitive dismissal from the military as a penalty for the commission of an offense by an officer. See, *e.g.*, Rev. Stat. §§ 1228, 1229 (1875 ed.). But Congress carefully distinguished between

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[10] See W. Winthrop, *supra*, at 746-747 (noting that President's power to drop from the rolls does not conflict with limitations on President's power to dismiss).

the "sentencing" question whether a particular offense warranted dismissal from the military as a punishment and the "employment" question whether the government should continue to employ (and pay for the services of) a particular officer in light of his absence without leave or other misconduct. Cf. *Parker* v. *Levy*, 417 U.S. 733, 751 (1974) (government's relationship to members of the military "is not only that of lawgiver to citizen, but also that of employer to employee"). The "sentencing" issue was entrusted to the court-martial authorities and the system of military penal justice. The distinct "employment" question was left to the President and those to whom he delegated authority, to be exercised by determining whether to drop the officer from the military rolls. Even if a particular court determined that dismissal was not appropriate in a given case as a penal sanction, it remained for the administrative, non-judicial authorities to determine whether the government should continue to employ (and pay for) the services of the officer. See 36 Op. Att'y Gen. 186, 188 (1930).

Second, the history of the action to drop from the rolls reveals the broad sweep of hitherto unquestioned administrative action that would be unconstitutional under the theory adopted by the CAAF. The action to drop from the rolls began as a means to address the problem of officers who were unfit to serve because of an extended absence without leave. In 1911, Congress added to that category officers who were imprisoned for substantial sentences pursuant to judgments of civilian courts. In 1996, Congress added the instant provision permitting the military to drop from the rolls officers like respondent, who were sentenced by courts-martial to confinement in military prisons for substantial periods. Because the basic thrust and consequences of an action to drop from the rolls has remained constant, however, if the action to drop from the rolls is now a penal measure, it has always been one. In particular, if the Double Jeopardy Clause now prohibits military authorities from imposing this alleged

"punishment" after a court-martial conviction, it also has prohibited the military (since 1911) from imposing the same alleged "punishment" on those convicted of offenses in federal civilian courts.[11] See, *e.g.*, 36 Op. Att'y Gen. at 186 (discussing dropping from the rolls officer convicted of criminal offense in federal district court but given suspended sentence).

3. Respondent's remaining arguments that the action to drop from the rolls was intended to be penal, either as originally enacted or as modified in 1996, are mistaken.

Respondent argues (Br. 22) that the action to drop from the rolls is necessarily penal (and presumably always has been), because it is premised on a criminal violation—either extended absence without leave (which is a violation of military law), sentence of a court-martial, or sentence of a civilian criminal court. As we explained in our opening brief (at 30-31), however, "the fact that a * * * statute has some connection to a criminal violation is far from the clearest proof necessary to show that a proceeding is criminal." *United States* v. *Ursery*, 518 U.S. at 292 (internal quotation marks and citation omitted).

Respondent argues (Br. 22-25) that Sections 1161(b) and 1167 are penal because they were enacted as part of the same statute that contained some provisions regarding the forfeiture of military pay after a court-martial. We explained in our opening brief (at 27) that the inclusion of both penal and remedial provisions in the 518-page National Defense Authorization Act for Fiscal Year 1996 does not support the conclusion that the remedial measures are in fact penal.

4. Respondent argues (Br. 27) that the action to drop an officer from the rolls, even if intended to be remedial, should

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[11] The double jeopardy problem would arise only if the previous conviction were in a federal, not state, court. See *Waller* v. *Florida*, 397 U.S. 387, 393-394 (1970); *Grafton* v. *United States*, 206 U.S. 333 (1907).

nonetheless be viewed as penal under the analysis in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Application of that analysis, however, does not support his conclusion that the action to drop an officer from the rolls is penal, much less provide the necessary "clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100 (citations, bracket, and internal quotation marks omitted).

For example, respondent asserts (Br. 27) that dropping him from the rolls "results in affirmative restraint," because he would "lose[] his military status and pay but remains in military prison subject to the UCMJ." His confinement in military prison is an affirmative restraint, but that confinement is the result of the judgment in his court-martial, not the result of his being dropped from the rolls. Although respondent will lose his military status and "forfeit"—*i.e.*, no longer receive, see R.C.M. 1003(b)(1)(2)—his military pay if he is dropped from the rolls, those consequences do not constitute an "affirmative restraint." Cf. *Hudson*, 522 U.S. at 104 (occupational debarment is not "an 'affirmative disability or restraint,' as that term is normally understood"). Instead, they are the natural and expected consequences of his inability to satisfy the requirements necessary to serve (and therefore be paid) as an officer in the armed forces. See Gov't Br. 29-30.

Respondent also asserts (Br. 28) that dropping officers from the rolls "promotes the traditional role of retribution and deterrence in the specialized military society" and that "[t]here is no rational alternative purpose assignable to the [dropping from the rolls] action." As the history of the dropping from the rolls action cited above demonstrates, however, the government has an interest, aside from its interests in punishing crime, in not employing (and paying for) the services of officers who have shown they are not quali-

fied for the positions they once held. The dropping from the rolls action is in service of that remedial goal.[12]

Respondent argues (Br. 30-31) that dropping him from the rolls would be penal because he would suffer "loss of *all* pay and allowances," experience "the stigma of separation with ignominy inherent in being dropped from the rolls," and lose "VA medical care" and "numerous other federal, state, and local benefits." Similar consequences may attend the commission of a crime by a civilian, who may lose a variety of pay and fringe benefits and suffer the stigma of having been fired. Nonetheless, the government is not disqualified from firing military or civilian personnel who have proven themselves unfit for their jobs, even (or especially) if the unfitness arises from having been convicted of a crime. See Gov't Br. 31. And, contrary to respondent's claim (Br. 32), the fact that the court-marital could have imposed the punitive sanction of dismissal, but did not do so, is not a basis for holding the remedial separation by dropping from the roles to be criminal punishment.

Finally, respondent argues (Br. 33-36) that, because the separation of an officer who is dropped from the rolls is not characterized as "honorable," it is necessarily penal. That is incorrect. An honorable discharge attests that an individual has satisfactorily completed military service; a separation

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[12] The fact that the government could have used the administrative separation mechanism of 10 U.S.C. 1181(b) to separate respondent from the armed services is of no consequence. Congress has determined that the conviction of a sufficiently serious offense is a sufficient basis to establish that an officer should be dropped from the rolls, without the extensive procedures required in an administrative separation proceeding. Moreover, if respondent is correct that the action to drop from the rolls is penal because it is premised on conviction by a court-martial (see Resp. Br. 26-27, 28) and because it has various adverse consequences on the officer (see *id.* at 29-37), then an administrative separation that is similarly premised on a court-martial conviction and that imposes similar consequences would also be penal and would therefore (under respondent's view) be similarly unconstitutional.

from the service without an honorable discharge is a simple acknowledgment that that was not the case. It is no more "penal" than a similar statement by a private employer characterizing the circumstances under which an employee had been dismissed. If respondent's argument to the contrary were correct, then all administrative separations that result in a separation other than an honorable discharge would be penal; any such separation would be barred by a preceding court-martial based on the same "offense" and the separation would itself bar any future prosecution of the discharged officer or enlisted personnel for that "offense."[13]

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For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be reversed.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1999

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[13] Respondent argues (Br. 37-39) that Air Force regulations did not provide for dropping those in his position from the rolls and that the President did not properly delegate his statutory authority to drop him from the rolls. Neither of these issues were addressed by the court of appeals, and neither are fairly included within the questions presented. Accordingly, this Court should not address either issue. See *Roberts* v. *Galen of Virginia*, No. 97-53 (Jan. 12, 1999) slip op. 5 & n.2.